DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-184972 DATE: MAY 5 1976

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MATTER OF: Angelo Raffin--Claim for living quarters allowance and return transportation

DIGEST:

1. Employee traveled to Italy and obtained position with nonappropriated fund (NAF) activity in 1961 which he held without break in service until appointed to appropriated fund position in 1966. By Executive Order 11137, dated January 10, 1964, employees of NAF activities became eligible for overseas allowances and differentials, subject to the agency's regulations. Therefore, employee's eligibility for living quarters allowance in 1964 should be determined by employing agency in light of the circumstances at the time of his appointment with NAF activity in 1961.

2. Employee traveled to Italy and obtained position with nonappropriated fund (NAF) activity in 1961 which he held without break in service until appointed to appropriated fund position in 1966. Under the Joint Travel Regulations the employee's presence in the foreign country in 1966 does not entitle him to negotiate a transportation agreement with his employing agency.

This action is a reconsideration of the denial on August 29, 1969, by our Transportation and Claims Division (now Claims Division) of the claim of Mr. Angelo Raffin for living quarters allowance (LQA) and return transportation while stationed overseas. The request for reconsideration was forwarded to this Office by the Department of the Air Force which questions the applicability of Executive Order 11137 to this case.

The record indicates that Mr. Raffin traveled to Italy in April 1961, with the alleged intention of vacationing and visiting with his parents who resided in Italy. In July 1961, he obtained a position with a nonappropriated fund (NAF) activity in Italy and remained in that position without a break in service until appointed to an appropriated fund position with the Department of the Air Force, effective February 13, 1966. Our Claims Division settlement denied the employee's claim for LQA stating:

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> "Since it appears that your worked and maintained your residence with your parents in Italy for personal reasons for almost five years subsequent to your departure from the United States and prior to your appointment as a civilian employee of the Department of the Air Force, and inasmuch as your status at the time of your appointment was not such as would entitle you to living quarters allowance under the above regulations, your claim may not be allowed."

In addition, the Settlement Certificate held that the employing agency was proper in determining that Mr. Raffin was ineligible to negotiate a transportation agreement since he had been absent from the United States more than 6 months at the time of his appointment in 1966 and had not been recruited in the United States by the NAF activity which previously employed him.

On appeal Mr. Raffin argues that the determination in his case conflicts with our decision B-167910, October 28, 1969, and that under the rationale of that decision, he became an "employee" at the time he was employed by the NAF activity in 1961. Further, he alleges that he was not granted the LQA while employed by the NAF activity because the activity was "not financially able to provide that benefit," and he argues that his eligibility for the housing allowance should be determined by looking to the time of his appointment as a NAF activity employee.

The authority for the payment for living quarters allowance to employees of the Government in foreign areas was contained in section 211 of the Overseas Differentials and Allowances Act, 74 Stat. 793, now codified in 5 U.S.C. 5923 (1970). The agency employing a United States citizen locally overseas must make the determination whether the person is entitled to the benefits authorized for Government employees recruited in the United States for overseas duty or transferred to overseas positions. The criteria for making such determinations are contained in regulations issued by the Secretary of State, the Standardized Regulations (Government Civilians, Foreign Areas), which provided, in pertinent part:

"031.12 Employees Recruited Outside the United States

"Quarters allowances prescribed in Chapter 100 may be granted to employees recruited outside the United States, provided that:

"a. the employee's actual place of residence in the place to which the quarters allowance applies at the time of receipt thereof shall be fairly attributable to his employment by the United States Government; and

"b. the employee is not a member of the household of another employee or of a member of the U.S. Armed Forces; and

"c. prior to appointment, the employee was recruited in the United States, the Commonwealth of Puerto Rico, the Canal Zone, or a possession of the United States, by

"(1) the United States Government, including its Armed Forces;

"(2) a United States firm, organization, or interest;

"(3) an international organization in which the United States Government participates; or

"(4) a foreign government;

and had been in substantially continuous employment by such employer under conditions which

provided for his return transportation to the United States, the Commonwealth of Puerto Rico, the Canal Zone, or a possession of the United States; or

"d. the employee was temporarily in the foreign area for travel or formal study and immediately prior to such travel or study had resided in the United States, the Commonwealth of Puerto Rico, the Canal Zone, or a possession of the United States; or

"e. as a condition of employment by a government agency, the employee was required by that agency to move to another area, in cases specifically authorized by the head of agency."

The language of the regulations as well as that of the statute is permissive rather than mandatory.

In its request for reconsideration the Department of the Air Force questions the applicability of Executive Order 11137 to the facts in this case. By Executive Order 11137, dated January 10, 1964, as amended, employees of NAF activities were declared to be employees of the United States for the purposes of the Overseas Differentials and Allowances Act, cited above. Our Office has considered the application of this Executive Order in a similar case, B-167910, supra, cited by Mr. Raffin. In that case, the claimant, Mr. Johnson, was first appointed to a position with a NAF activity in February 1966, and then was employed in an appropriated funds position in March 1967 without a break in service. Mr. Johnson had received LQA while employed by the NAF activity, and the allowance was continued when he was employed in the appropriated funds position. In June 1968 his employing agency determined that he was not eligible for the allowance, but the allowance was restored to Mr. Johnson in January 1969, on the basis of a waiver of section 031.12c of the Standardized Regulations granted by his employing agency, the Department of the Air Force. We held, pursuant to a claim filed by Mr. Johnson, that under

Executive Order 11137 he became an employee of the United States for the purposes of the Overseas Differentials and Allowances Act at the time of his appointment in 1966, and, assuming that the initial determination of eligibility for LQA in February 1966 was proper, we saw no reason why LQA should not have been continued when Mr. Johnson was transferred to an appropriated funds position in March 1967.

In the present case, Mr. Raffin was appointed to a position with a NAF activity in 1961, and at that time he was not considered to be an "employee" of the United States under the Overseas Differentials and Allowances Act, cited above. With the enactment of Executive Order 11137, however, the definition of an employee under the above-mentioned act was expanded to include employees of NAF activities, and the eligibility of such employees for such allowances was subject to regulations issued by each agency. As we noted in B-167910, supra, Department of the Air Force regulations (AFR 176-1) stated that allowances and differentials for employees of NAF activities would not exceed those established by the Standardized Regulations, and local NAF activities followed the same criteria for determining eligibility for LQA as specified in the Standardized Regulations. Therefore, to determine Mr. Raffin's eligibility for LQA as of January 10, 1964, we would look to the time of his appointment in 1961. Based upon the record before us, it appears that the claimant would be eligible for LQA under section 031.12a, b, and d. However, unlike the circumstances in our decision B-167910, supra, the employing agency has not made a determination that Mr. Raffin was otherwise eligible for LQA. That determination should be made by the Department of the Air Force in light of the discussion above regarding the application of Executive Order 11137.

Mr. Raffin also appeals the determination by our Claims Division that the employing agency was proper in declaring the claimant ineligible to negotiate a transportation agreement upon his appointment on February 13, 1966. Entitlement to travel and transportation benefits is governed by 5 U.S.C. 5722 (1970) and the regulations promulgated thereto. Eligibility for LQA does not confer eligibility to negotiate a transportation agreement. See B-173424, September 2, 1971. As noted in the Settlement Certificate, paragraph C4002-3b(2), Volume 2, Joint Travel Regulations, in effect at the time of Mr. Raffin's employment in 1966 when he was appointed to an appropriated fund activity position, provided that an employee's presence in the area must be under the following circumstances:

1. A student engaged in formal study;

2. A traveler for business or vacation purposes, who had been absent from the United States for not more than 6 months;

3. A member of the Armed Forces of the United States separated locally for the express purpose of accepting Federal employment;

4. An employee of another Federal department, agency, or instrumentality * * * nonappropriated fund activity * * * providing the individual was recruited in the United States under conditions of employment which provided for return transportation; or

5. A locally hired dependent of a member of the military service or of civilian personnel * * * .

Mr. Raffin's presence in Italy in 1966 at the time of his appointment does not fall within one of the conditions listed above, and, therefore, that portion of the Claims Division Settlement is affirmed.

Accordingly, action should be taken by the employing agency in accordance with the discussion above.

R.F. KELLER

[Deputy] Comptroller General
of the United States